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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ELLIS T. JONES III, Defendant and Appellant.	H036831 (Santa Clara County Super. Ct. No. CC637132)

A jury found that defendant Ellis T. Jones, III, committed a number of armed assaults and robberies on people using an online classified advertisements website. On appeal he claims that the trial court erred in punishing him for all of his convictions rather than some of them under California's rules regarding multiple punishment. He also disputes the amount of a court-imposed fine and points to an administrative error.

We will remand the case for further proceedings regarding the punishment for false imprisonment, a restitution award, and an administrative matter, but otherwise affirm the judgment.

PROCEDURAL BACKGROUND

Defendant robbed people in four separate criminal episodes. The jury convicted him of four counts of second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).)[1] It also convicted him of one count of attempted robbery (§§ 211, 212.5, subd. (c), 664), one count of false imprisonment by violence or menace (§ 237, subd. (a)) as a lesser included offense to the original charge of kidnapping for purposes of robbery (§ 209, subd. (b)), and four counts of assault with a stun gun (§ 244.5, subd. (b)).

The trial court sentenced defendant to 11 years and four months' imprisonment. As relevant to this appeal, the court also imposed a $400 restitution fine pursuant to subdivision (f) of section 1202.4 to compensate a victim for the loss of his cellular telephone.

FACTS

The relevant facts will be set forth in detail in our discussion of defendant's claim that the trial court imposed multiple punishments on him because of an erroneous application of section 654. In brief, defendant operated a crime scheme under which he posed as either the buyer or seller of high-technology merchandise on the Craigslist online classified advertisements website. He would convince his victim or victims to drive to San Jose, meet them at an agreed-upon location, persuade them to go to a secondary location offering more seclusion, and then rob them, using a handgun, a Taser stun gun, or both weapons. He did this on four separate occasions. The victims on one occasion were Jaime Gonzalez and Ajamu Collins; on another, the victim was Matthew White; on another, it was Thuan Hoang; and on another it was Mario Tabares.

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[1] All statutory references are to the Penal Code.

DISCUSSION

I. *Claim of Erroneous Imposition of Multiple Punishments*

Defendant claims that the trial court acted contrary to state law in imposing multiple punishments on him, contrary to decisional rules derived from section 654.

A. *Factual and Procedural Background*

The trial court was concerned to make a detailed record summarizing the trial testimony so that it could decide on whether defendant was susceptible to multiple punishments for the various crimes of which the jury convicted him.

The trial court described the state of the evidence and its interpretation of it in sentencing defendant consecutively, and not staying certain terms under section 654, as follows:

"All of these [sentencing] factors [in aggravation] indicate that probation would be inappropriate and an aggravated sentence as to count one is appropriate. And as all of the crimes charged are violent crimes consecutive sentences are appropriate.

"I do believe there was an issue in this case about whether the assault with stun gun charges are merely part of the robberies and a single course of conduct and consequently cannot be sentenced individually pursuant to Penal Code section 654.

"I have reviewed *People versus Logan*, 41 Cal.2d 279; *People versus Brown*, 198 Cal.App.2d 253; *People versus Donohoe*, 200 Cal.App.2d 17; and *People versus Watts*, 76 Cal.App.4th at 1250.

"I am going to follow *Watts* for three of the victims. I want my reasoning to be clearly understood. Therefore, I'm going to summarize the *Watts* case as well as the evidence in this case that I believe supports consecutive sentences for assault with a stun gun, or as to one victim does not support the consecutive sentence.

"In *Watts* three men entered a restaurant and robbed at gunpoint two employees and attempted to rob two other employees. Only Watts was on trial at this time.

"One of the employees tried to pull away from one robber who grabbed her around the neck and face and demanded money from the cash register. He hit her with a heavy object and knocked her to the floor.

"Another victim was ordered to the floor and then forced to walk to the safe and ordered to open it.

"When she missed the correct combination the first time, the robber put a gun against her temple and said he was going to count to five and she better have the safe opened. He left before the safe was opened.

"Another victim was forced at gunpoint to open her register. The robber took the money from the register, all the money from the tip jar, and ordered the victim to get down on the floor which she did. The man threw a glass cup at her and threw the tip jar down by her head.

"The fourth victim heard screaming and began to run when she was ordered to get down on the ground.

"She continued to run but the robber stopped her and she got down on her knees. The robber pointed a gun at her and ordered her to give him money from a machine but she told him that the machine had no money. He then ordered her to identify the person who had access to the money. And she told him it would be the lady up front. When the robber told her to get up she refused and he hit her on the side of the head with a gun, pointed the gun at her face and ordered her to get up.

"He followed her to the front where she pointed out the witness who could open the safe.

"The defendant was convicted of two counts of robbery, two counts of attempted robbery, and four counts of assault with a deadly weapon. The trial court concluded that the robberies were separate from the assaults and imposed separate punishments for each. The defendant contended that the imposition of separate punishments was error because the assaults and robberies were but part of a single course of conduct and argued that the

assaults were committed with the intent to commit robbery and as a means of committing the robberies.

"The court pointed out that whether a defendant held multiple criminal objectives presented a question of fact and the trial court's finding on the question would be upheld if it was supported by substantial evidence.

"As to the victims [in *Watts*] there was evidence each was assaulted either as she was attempting to comply with her assailant's demand for money or was attempting to escape. The court said the evidence accordingly shows that the robberies were well underway at the time that the assaults occurred and thus supports the conclusion of the trial court that the assaults therefore were not simply a means of committing the robberies.

"Substantial evidence support[ed] the trial court's conclusion that the assault of each victim was not merely incidental to the objective of robbing that victim but a separate act with a separate objective and [it] follow[ed] that the court was entitled to impose separate sentences for each assault and each robbery.

"So now I'm going to tell you how I view the evidence. . . . I want this to be clear.

"As to Matthew White[,] who responded to a Craigslist ad from the defendant, he got to the site, he loaded the program on his computer and it took him 10 or 20 minutes to do so. The defendant was about five stairs above him. Mr. White gave the defendant his $400, which was the price of the [Microsoft Corporation] Xbox [video game console], and then he put his wallet in his pocket. At that point the defendant pulled out a handgun and pointed it at him.

"The defendant ordered Mr. White to go down the stairs. White complied. He left the laptop on the stairs. The defendant ordered him to give him his wallet and cell phone and he did.

"And at some point the victim, Mr. White, saw that the defendant had a Taser in one hand and a gun in the other.

"The defendant told Mr. White to climb over a railing and as he was doing that the defendant tased him. That is the [violation of section] 244.5.

"The defendant ordered Mr. White to give him the black duffel bag he found under the stairs. Mr. White did so.

"The defendant ordered him to face the corner and went up the stairs. He asked Mr. White for his pen [*sic*] which I believe Mr. White gave him. And the defendant then threatened him and told him he knew where he lived. And then he left.

"It is appropriate to impose a separate and consecutive sentence for the assault with the stun gun as Mr. White substantially complied with all of the defendant's orders at the time he was tased. He had already given him his money, the $400, his wallet, his cell phone and the laptop.

"The only thing Mr. White gave the defendant after being tased was the defendant's own duffel bag.

"Consequently, I intend to impose the aggravated term of five years on Count One because I believe it showed planning and sophistication. And I will run Count Two consecutively because I believe it was violent conduct which indicates a serious danger to society. And eight months is the midterm, one-third of the midterm.**[2]**

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2 For each criminal episode that the trial court described, we will add anything additional or different that is relevant to the appeal or otherwise worth mentioning. In the case of Matthew White, we think it important to note that it was not a "pen" that defendant obtained from the victim, but the victim's personal identification number (PIN) for a debit card, which defendant forced White to divulge. Thus, the court's statement that "The only thing Mr. White gave the defendant after being tased was the defendant's own duffel bag" is not entirely correct—as we will explain, however, defendant cannot benefit from this minor error. The time sequence that the court noted is correct. We also note that the stairwell to which the court referred was secluded, allowing defendant to carry out the crimes unobserved, and that White was attempting to buy an Mbox, not an Xbox. Mbox appears to be the term for an item of audio interface hardware, made by more than one manufacturer, that allows the operator to record, edit, and mix musical performances.

"As to Mr. Hoang, he met the defendant on the street. He got out of the car with the laptop that he was going to sell . . . . The defendant said I have the money over here, let's walk over here. And then walked to a little alley. Mr. Hoang was in front of the defendant and as they were walking to the alley the defendant tased Mr. Hoang and he felt the electric shock on his back. He fell on the ground and the defendant pulled out a gun and said give me your wallet and everything you have. The defendant already had the laptop at that point.

"Mr. Hoang threw his wallet, cell phone and car keys at the defendant. The defendant ordered him to get up and pointed the gun at him and then ordered him into the trunk, walked about 20 feet to the car.

"Mr. Hoang then got into the trunk and the defendant shut the trunk. He heard the car door open and it sounded like the defendant was rummaging through the car.

"It appears to me that the reason for tasing the victim was to obtain all of his property, or in other words, the objective was robbery. I think Penal Code section 654 applies. If not, I would have sentenced the defendant to eight months consecutive on this charge because I think that the conduct warrants that.

"However, since I think [section] 654 applies I will impose the midterm of two years concurrent on the 244.5 as to Mr. Hoang.

"The false imprisonment charge is not a [section] 654 issue and a consecutive sentence is appropriate as I believe locking Mr. Hoang in the trunk showed a high degree of cruelty. The [section] 211 [punishment] will be imposed consecutively. It is a violent crime and it is a separate act against a separate person.**[3]**

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3 In fact, Hoang did not throw his personal effects at defendant, but laid them on the ground for defendant to take.

"As to Jaime Gonzalez and Ajamu Collins, Mr. Collins . . . checked out the Xbox [that defendant was purporting to sell them]. And when he said it was okay, Mr. Gonzalez gave the money to the defendant, $325. And the defendant opened the door to leave the car and appeared to be leaving and then jumped back inside. At that point he placed a choke hold on Mr. Gonzalez and told Mr. Collins to put the Xbox back in the duffel bag, which he immediately began to do. And then the defendant began to tase Mr. Gonzalez 15 or 20 times. Mr. Collins was trying to get everything in the duffel bag. And, nevertheless, the defendant tased both him and Mr. Gonzalez and told Mr. Collins to hurry up, do it faster.

"After being given the duffel bag with the Xbox, the defendant ordered Mr. Gonzalez to give him his car keys and cell phone, and Mr. Gonzalez complied. The defendant then got out of the car, ordered the victims out and told them to empty their pockets.

"When Mr. Gonzalez was trying to empty his pockets the defendant tased him again. The defendant took Mr. Collins' backpack and rummaged through it and then threw it back to him as there was nothing there. The defendant then searched the car and . . . ordered the victims to go about 30 feet away and then he ran away.

"As in *People versus Watts* the victims were tased while they were attempting to comply with the defendant's demands. First Mr. Collins was trying to get everything back in the duffel bag. Mr. Gonzalez was being choked by the defendant. And the defendant tased both men many times. And then when they were outside of the car after the defendant had the duffel bag and Mr. Gonzalez was attempting to empty his pockets, he was tased again.

"The evidence clearly showed that Mr. Gonzalez and Mr. Collins were attempting to comply with the defendant's demands to give him everything when he repeatedly tased them. He did not need to tase them in order to accomplish the robberies. As soon as he

placed the choke hold on Mr. Gonzalez and ordered Mr. Collins to put the Xbox in the bag, the men began to comply. There was simply no need for further force.

"The tasing was a separate act with a separate objective as to each man. Consequently, it is appropriate to sentence consecutively on the [section] 244.5 [conviction] since there is no [section] 654 problem.

"Therefore, the court intends to sentence . . . one-third the midterm on the robbery [on] . . . .

"The Probation Officer: Count Six.

"The Court: Count Six as to Jaime Gonzalez.

"That will be one year consec[utive] since it is a separate act, a separate victim. The count seven will be eight months consec[utive] as to Mr. Collins. That was also a separate act, a separate victim.

"And then eight months consecutive on Count Eight and eight months consecutive on Count Nine as I believe . . . they were separate acts and they had separate objectives and they are not [amenable to section] 654.

"As to Count 10, the robbery against Mr. Tabares, the Taser was not used. It was a separate act against a separate victim. And so the court intends to impose . . . one-third the midterm. So that will be one year."[4]

Later during the sentencing hearing, the trial court further summarized its sentencing choices. As relevant here, it stated:

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[4] Here the trial court was referring to defendant's armed robbery of Mario Tabares. In this episode too, defendant was purporting to sell his victim an Xbox via Craigslist. He persuaded Tabares to come to San Jose and had him park on the premises of an apartment complex. He pressed a gun into the victim's cheek and obtained his wallet, money, cellular telephone, and shoes, telling him, "don't do anything stupid." Defendant then left the scene, taking all of the victim's property except the shoes, which he left underneath the victim's car.

"The defendant is committed to the California Department of Corrections and Rehabilitation for 11 years and four months. And his sentence is as follows: As to Count One, I am choosing the aggravated, the upper term, because I believe that it showed planning and sophistication and, therefore, the principal term is five years.

"As to Count Two, the [section] 244.5, for the reasons I previously stated, I do not believe that there is a [section] 654 problem. And I believe that the factor of being violent conduct indicating that serious danger to society has been shown [is an aggravating factor under rule] 4.421(a)(8) [*sic*] [of the California Rules of Court]. And that will run consecutively [as an eight-month term].

"[¶] . . . [¶]

". . . I am going to go to Count Four next which is the robbery against Mr. Hoang, a separate act, a separate violent act and separate victim. And that will be consecutive. So it will be one-third the midterm, or one year.

"As to the Count Three, [section] 237(a), it was also a separate act. And I believe it showed a high degree of cruelty pursuant to [rule] 4.421(a)(1) [of the California Rules of Court]. So that will be one-third the midterm of eight months consecutive. And as to Count Five, a [section] 244.5(b) against Mr. Hoang, for the reasons I have previously stated I believe that is a [section] 654 issue. And, therefore, the midterm, full midterm concurrent will be imposed. If this [were] not a [section] 654 issue I would impose the eight months consecutive.**[5]**

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5 The trial court would later repeat that Count Five involved "a [section] 654 issue. And, therefore, the midterm, full concurrent midterm will be imposed." Still later, however, the probation officer, who was present at the sentencing hearing, asked, "on Count Five, did the court [intend to] impose the two years and then stay that pursuant to [section] 654?" The court replied that it had meant to do that and corrected its prior statements: "As to Count Five, two years is imposed and stayed."

"As to Count Six, the robbery charge against Mr. Gonzalez, it's a separate act, a separate victim and it is a violent crime. And I will impose one-third of the midterm consecutive for one year consecutive.

"As to the attempted robbery count against Mr. Collins in Count Seven, separate act, separate victim, one-third the midterm, consecutive eight months.

"As to Count Eight, the [section] 244.5(b) against Mr. Gonzalez, for the reasons I have already stated, I do not believe that is a [section] 654 problem. And it should be imposed consecutively because it was a separate act and involved a violent conduct that was a serious danger to society. That will be eight months consec[utive] as to Count Nine.

"The [section] 244.5(b) against Mr. Collins, I also find that is a separate act, a separate objective, no [section] 654 problem. It showed a serious danger to society. The sentence will be one-third the midterm or eight months consecutive.

"As to Count Ten, the robbery against Mr. Tabares, a separate victim, a separate act. And the appropriate punishment is one-third the midterm for one year.

"For any sentence which was mandatory I would have imposed it if it were not.

"So the total term is 11 years and four months."

B. *Legal Considerations*

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Decisional law created the following standards for applying section 654: First, "Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) That is, "a single act or omission . . . can be punished but once." (*Id*. at p. 360.) That is not a

problem here, because defendant committed different physical acts: he took and asported the victims' property and he used a Taser for what we will explain was a different purpose, or, regarding one of defendant's claims, he took and asported the victim's property and he locked the victim in the trunk of the victim's car. (We shall have more to say later about the trial court's sentencing decision regarding this episode.) However, as is the case here, " '[f]ew . . . crimes . . . are the result of a single physical act.' [Citation.] Accordingly, the relevant question is typically whether a defendant's ' "course of conduct . . . comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." ' " (*People v. Correa* (2012) 54 Cal.4th 331, 335.) " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*Ibid.*) Thus, and in sum, "Our case law has found multiple criminal objectives to be a predicate for multiple punishment . . . in circumstances that involve, or arguably involve, multiple acts." (*People v. Mesa* (2012) 54 Cal.4th 191, 199.)

"A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Applying essentially the foregoing legal principles, *People v. Watts* (1999) 76 Cal.App.4th 1250, the case on which the trial court relied, stated: "As to the victims here, there was evidence that each was assaulted either as she was attempting to comply with her assailant's demand for money or was attempting to escape. [One victim] was struck as she was attempting to pull away. [A second victim] was struck after she told her assailant where to find the money and as she was lying on the floor. A gun was placed against [a third victim's] head after she complied with her assailant by taking him to the back office and attempting to open the safe. [A fourth victim's] assailant threw a glass

cup by her, and the tip jar near her head, after she had complied with his demands to open the cash register. The evidence accordingly shows that the robberies were well under way at the time the assaults occurred, and thus supports the conclusion of the trial court that the assaults therefore were not simply a means of committing the robberies. Substantial evidence therefore supports the trial court's conclusion that the assault of each victim was not merely incidental to the objective of robbing that victim, but a separate act with a separate objective. It follows that the court was entitled to impose separate sentences for each assault and each robbery." (*Id.* at p. 1265.)

In this case, substantial evidence supports the trial court's determination that defendant's shocking the victims was for a different purpose than to rob them. The court twice mentioned defendant's "cruelty" toward Hoang in locking him in the car trunk. It is inescapable that it reached an "implied determination" (*People v. Brents, supra*, 53 Cal.4th at p. 618) that defendant similarly desired to humiliate, dominate, and/or cause gratuitous suffering to the other victims by use of the Taser, entirely apart from using the device to facilitate the robberies.

We need not go as far as the broad rule stated in *People v. Watts, supra*, 76 Cal.App.4th 1250, to reach this conclusion. To the extent that *Watts* offers a rule that section 654 does not apply whenever a robber applies force after the robbery is well underway, we can conceive of scenarios in which that might not be the case—i.e., in which a defendant might use force to persuade the victim to act faster or resist less, as happened here one or more times. At other times, however, defendant's shocking of the victims did nothing to facilitate the crimes or even interfered with their swift completion.

In the case of Matthew White, the trial court ordered defendant punished for both robbery and use of a stun gun because "[t]he defendant told Mr. White to climb over a railing and as he was doing that the defendant tased him. That is the [violation of section] 244.5." This ruling was correct. Although, contrary to the court's statement that "[t]he only thing Mr. White gave the defendant after being tased was the defendant's own

duffel bag," the robbery spree was not yet complete, because defendant would demand White's personal identification number from him after shocking him, the shocking had no evident connection to that final act. To that point, White had complied with every demand defendant had made. The court implicitly found that defendant was acting out of cruelty, the desire to humiliate, and/or a psychological need for dominance, and substantial evidence supports its finding.

With regard to Gonzalez, the trial court accurately stated that at one point Gonzalez was trying to empty his pockets to give defendant property and defendant shocked him anyway. This did nothing to speed up the robbery's completion or facilitate it in any way. Gonzalez was complying fully and defendant's act could only slow down the robbery's progress. The court implicitly found that defendant was acting out of cruelty, the desire to humiliate, and/or a psychological need for dominance, and substantial evidence supports its finding.

With regard to Collins, the question is closer, because the trial court accurately stated that defendant shocked him as he was trying to comply with his instructions and told him to, in the court's words, "do it faster." Gonzalez testified at one point, however, that Collins "was fumbling and he was trying to give the bag back and he would just Taser him." In addition, defendant was engaging in Taser overkill with the two victims: Gonzalez testified that defendant shocked him personally "15 to 20 times" and was shocking Collins repeatedly. If we were to follow the rule stated in *People v. Watts*, *supra*, 76 Cal.App.4th 1250, this course of conduct would unquestionably allow multiple punishments, because defendant was shocking the victims while the robbery was well underway. As we have stated, however, *Watts*'s rule may be overbroad. Nevertheless, the record satisfies us that there is substantial evidence for the court's implicit ruling that defendant was acting out of cruelty, the desire to humiliate, and/or a psychological need for dominance in shocking Collins, and we will not disturb the judgment with regard to him.

That leaves the trial court's ruling that defendant is to be separately punished for robbing Thuan Hoang and falsely imprisoning him in the trunk of Hoang's car. The court agreed that defendant shocked Hoang to facilitate the robbery and hence applied section 654 to the robbery and the stun gun assault charges. However, with regard to false imprisonment, the court stated, "The false imprisonment charge is not a [section] 654 issue and a consecutive sentence is appropriate as I believe locking Mr. Hoang in the trunk showed a high degree of cruelty."

Of course, if section 654 applies, then not even a concurrent sentence may be imposed. " 'It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.' [Citation.] Instead, the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.' [Citations.] Accordingly, . . . the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment." (*People v. Jones*, *supra*, 54 Cal.4th at p. 353.) A fortiori, a consecutive sentence may not be imposed, even if the crime's cruelty would otherwise justify a consecutive sentence.

We cannot find substantial evidence to support the trial court's determination that the false imprisonment of Hoang was separately punishable. Locking Hoang in the trunk was cruel and perhaps defendant enjoyed the act, but on this record there is no evidence that he confined him for any reason other than to continue the robbery and obtain as much property as he could. As the court accurately summarized, Hoang and the prosecutor had this exchange before the jury:

"Q. Did you actually climb into the trunk of your own car?

"A. Yes.

"Q. What happened next?

"A. He shut the trunk.

"Q. And when you were inside of the trunk of your car could you hear anything?

"A. Yeah.

"Q. And what did you hear?

"A. He opened . . . my car door, went through it, and he closed it."

It is evident that Hoang was testifying that defendant rummaged through the car, as the trial court stated. Hoang confirmed this twice on cross-examination:

"Q. [W]hile you were inside of the trunk do you recall . . . hearing some type of searching through your car . . . ?

"A. Yes."

"Q. [Y]ou did hear the suspect looking through your car, though[?]

"A. Yeah."

Thus, as with shocking Hoang, locking him in the trunk of the car was done to facilitate the robbery, which was not complete, even though on cross-examination Hoang testified that he did not find anything missing from the car when he later looked.

In sum, there is substantial evidence only that defendant intended to rob Hoang. Therefore, defendant's false imprisonment sentence must be stayed under section 654.

II. *Claim of Error in Abstract of Judgment*

Next, defendant claims that the abstract of judgment does not accurately report one of the trial court's sentencing decisions.

As stated, at the sentencing hearing the trial court's last word on the subject was that it would stay Count Five, which was the charge of assaulting Hoang with a stun gun. The court, it will be recalled, had explained that it viewed the use of the Taser as part of the armed robbery of Hoang and thus it could not be separately punished. The abstract of judgment, however, recites that the court imposed a two-year concurrent term on this charge. As we have stated, concurrent terms may not be imposed for charges susceptible to section 654's limitation on multiple punishments. It is the oral pronouncement of

judgment that determines the sentence in any event. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) The court may remedy this error on remand.

III. *Restitution Award*

Defendant claims that the trial court erred in awarding, pursuant to subdivision (f) of section 1202.4, $400 in restitution regarding a cellular telephone belonging to one of the victims.

Defendant stole a cellular telephone belonging to Jaime Gonzalez during his robbery of him and Ajamu Collins. The San Jose Police Department recovered the device and Gonzalez retrieved it. Nevertheless, the trial court stated during the sentencing hearing that "I am making a general order of restitution" to Gonzalez. The court explained that, in addition to his car keys, on which the court did not place a value, Gonzalez lost $325 in cash and a portable memory storage device worth $20. In addition, the court noted, "[h]e said his phone was worth $400." The court ordered defendant to pay $745 in restitution for these three items.

Subdivision (f) of section 1202.4 provides in pertinent part that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court."

"A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall." (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172.) In *In re K. F.* (2009) 173 Cal.App.4th 655, we intimated that restitution is intended to make the victim whole but not to give him an unjustifiable premium. "[T]he statute has been construed to permit reimbursement only for demonstrated 'actual loss' to the victim." (*Id*. at p. 662.)

The parties agree that this ruling is subject to question. Defendant argues that Gonzalez recovered the phone and is entitled to no restitution. He asks us to "merely

strike $400 from the total order for victim restitution." The People, however, contend that the record is silent regarding whether Gonzalez got back the phone in the same condition in which defendant took it from him and asks us to "remand for the trial court to conduct a restitution hearing on this issue." We agree with the People. If Gonzalez's phone was damaged or had valuable information erased from it, he may have incurred an economic loss as a result. In that case, defendant must compensate him for it. (§ 1202.4, subds. (a)(1), (f).)

DISPOSITION

The case is remanded to the trial court for resentencing proceedings. First, the sentence for false imprisonment is to be stayed pursuant to Penal Code section 654. Second, the trial court is to determine whether it must modify its restitution order regarding the cellular telephone of one victim for the reasons stated in this opinion or for any other reason that may become apparent. Third, for the reasons stated herein—including, beyond the directions in the first two items noted in this disposition, the need for administrative correction regarding count five—the trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Rushing, P. J.

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Premo, J.